IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A., And FIKIRINI, J.A.)

CONSOLIDATED CIVIL APPEAL NOS. 150 & 158 OF 2019

1. MOHAMED MASOUD ABDALLAH
2. ATHUMANI SELEMANI MWINJUMA
3. SAID KISOMA
4. KISAKA JOHN MNKENI
5. SAID MLINDO
6. SAIDA M. OMARY
7. JOEL MICHAEL MWANGENDE
8. TULINAGWE BENSON MWAKYOMA
9. YOHANA MBINILE SHULA
10. WALIVYO PETER LUMBANGA
11. AZIZ NASSOR
12. SHABAN NGURE MTEGWA
13. PETER KASSIAN LUMBANGA
14. ALLY M. MLINDO
15. ELIAS BENSON MWAKYOMA
16. LUPAKISYO BURTON MLAGA
17. KESSY JOHN MNKENI
18. NURU RAMADHANI ALFAN as administratrix of the estate of ZENA ATHUMAN ABDALLAH
19. MARIAM MSHAMU NANGULANGWA
20. SEIF SAID MWELONDO
21. SALUM SAID NGOMA
22. ASIA HASSAN ABDALLAH
23. CATHERINE KACHINDA MKOMBOZI as administratrix of ANDREA IGNATIO MBELWA
24. GLORIA EDWARD SHIGAZU
25. FIKIRI ISMAIL MWINYIMVUA
26. ESTOM MWAKASAGULE KIFUKWE

..... APPELLANTS

27. LUCIA JOSEPH MAHUSHI as administratrix of the estate of NEHEMIA SYLVANO MAHUSHI
28. SAID MOHAMED ABDALLAH as administratrix of MOHAMED ABDALLAH LIPUNGO
29. SUDI JUMA BAKARI
30. HASSAN MOHAMED MJELA
31. IBRAHIM DAUDI MJEMA
32. ZAITUNI SAID NGOMA
33. RAJABU JUMA MGUMBA as administrator of the estate of JUMA ATHUMAN MGUMBA
34. ELKA PHILOPO NYANDA as administratrix of the estate of MICHAEL BUREGWA NYANDA
35. DAUDI ALPHAYO NDIWABU
36. PROTAJIA MATHIAS SIMON as administratrix of the estate of MATHIAS SIMON
37. SALAMA HUSSEIN MZAINA as administratrix of the estate of HASSAN A. MNYEMBETWANI
38. AKAU S. SWAI
39. DANIEL KYANDO
40. STEVEN DANIEL SANGA
41. HAMIS BAKARI KINYONDO
42. BAKARI CHUMA
43. CASMIR MAGESE KABADI

.... APPELLANTS

VERSUS

TANZANIA ROAD HAULAGE (1980) LTD. ..... RESPONDENT

(Consolidated Appeals from the Judgment and Decree of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Mgonya, J.)

dated the 24th day of December, 2018

in

Land Case No. 140 of 2014

.....

JUDGMENT OF THE COURT

20th Aug, 2021 & 15th Nov, 2021

SEHEL, J.A.:

Tanzania Road Haulage (1980) Ltd, the respondent herein sued the above-named appellants together with three others, namely Shaban Ngure Mtegwa, Joyce Elias Mbena and Selemani Mohamed, not parties in the present appeal, over a piece of land situated at Plots Nos. 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2009 on Block 3 and Plot No. 2006, Block 1 at Kurasini area in Dar Es Salaam Region (the suit premises). The suit was instituted in the High Court of Tanzania (Land Division) at Dar es Salaam (the trial court) vide Land Case No. 140 of 2014. The reliefs which the plaintiff/respondent sought were: - a declaratory order that the respondent was a rightful owner of the suit premises, an order for vacant possession, an order for demolition of all structures built by the appellants, an eviction order, general damages for wrongful occupation of the suit premises, costs of the suit and any other reliefs that the High Court may deem fit to grant.

In the plaint, the respondent averred that it was a lawful registered owner of the suit premises for a term of 99 years with effect from 17th January, 2011. That, it acquired the suit premises for the use of wholesale

and storage warehouse and that it had paid Tanzania Shillings Eight Billion Seven Hundred Thirty-Four Million Six Hundred and Fifty-Four Thousand Only (TZS. 8,734,654,800.00) and land rent for the year 2013/2014. It further claimed that, pursuant to section 6 of the Land Acquisition Act, Cap. 118 R.E. 2019 (the LAA), the Minister for Lands, Housing and Urban Development (as it then was) issued a Government Notice (G.N.) No. 202 of 27th September, 1994 to the effect that the suit premises was declared to be a redevelopment area and it was followed by a redevelopment plan made under the Town and Country Planning Ordinance published in the G.N. No. 54 of 25th January, 2002. It was further averred that, the appellants illegally occupied the suit premises without any claim of right or lawful excuse and they were unlawfully carrying out trades and businesses therein. That, by virtue of their illegal occupation, they had prevented the respondent from developing it.

In their joint written statement of defence, the appellants disputed the allegation by the respondent that it lawfully occupying it and put it to strictest proof. The appellants claimed that they were not paid any compensation because the receipts attached to the plaint showed that the respondent paid the money to the Government while it was fully aware of the appellants' lawful occupation of the suit premises. They further averred

that the G.Ns. cited by the respondent did not render it to be a lawful owner of the suit premises.

During the final pre-trial and scheduling conference, the trial court framed the following three issues for determination: -

1. *Who is the lawful owner of the disputed property (the land comprised in Kurasini Block 3 known as Plots Nos. 2000, 2001, 2003, 2004, 2005, 2007 and 2009 as well as 2006 Block 1 held under certificate of Occupancy No. 118145, 118146, 118147, 118148, 118150, 118152, 118153 and 118154).*
2. *Whether the respondent have (sic.) legally acquired the disputed properties from the appellants.*
3. *To what reliefs are the parties entitled.*

In order to prove its case, the respondent called one witness, Daudi Hamis Mlezi, the estate manager (PW1). On the part of the appellants, four witnesses gave their oral examination in chief while others gave their evidence through affidavits and they were only called for cross examination and re-examination. A total of forty-one witnesses testified.

The record has that on 19th December, 2018 when the matter was scheduled for judgment delivery, the trial court invited parties to address it on whether the appellants were compensated. The trial court heard the

counsel's submission and reserved the judgment to be delivered on the 24th December, 2018.

As scheduled, the judgment was delivered on 24th December, 2018 in the presence of the counsel for parties. In its judgment, the trial court made reference to the final pre-trial and scheduling conference as follows: -

> *"In conformity with the provision of Order XIV Rule 1 (5) of the Civil Procedure Code, Cap. 33 [R.E. 2002] during the finai pre-trial and scheduling conference, issues drawn by the court and agreed by parties herein are as follows: -*
>
> *1. Who is the lawful owner of the disputed properties namely, Plots No. 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2009 and Plot No. 2006 Block 1 within the City of Dar es Salaam; and*
>
> *2. To what reliefs are the parties entitled to."*

Thereafter, the trial court embarked into determining the above two issues. The first issue was answered in favour of the respondent. After referring to section 2 of the Land Registration Act, Cap. 334 [R.E. 2002] (the Land Registration Act) that defined the word "owner" to mean, in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered and section 33 (1) (a) of the Land Registration Act that recognizes the registered owner holding it free from

any encumbrances, the trial court found and held that since the respondent/ respondent was issued with the Certificate of Titles in respect of the suit premises, exhibit P2, then it successfully proved to be the registered owner of the suit premises. Accordingly, the trial court declared the respondent to be the lawful owner.

After it had determined the first issue, the trial court embarked into discussing the issue of compensation. It said: -

> *"Before I venture into the 2nd issue, I have noted from the defendant's written statement of defence in their paragraph 3 that they claim not to be compensated. Despite of the fact that DW1 has testified to the effect that the residents of Kurasini where the project is were compensated but they chose not to vacate, let me say something about it."*

It then asserted that: -

> *"From the wording and evidence adduced so far in this case is that, the land acquired by the Government from Kurasini residents the defendants inclusive, was for public interest as well stated under section 4 (1) (d) of the Land Acquisition Act 1967... Further, section 156 of the Land Act, Act No. 4 of 1999 recognizes that persons who were in actual occupation, are entitled to compensation. Further,*

the duty to pay compensation shall lie with the Government Department of Ministry, Local or Public Authority or Cooperate Body which applied for the public right. And that duty shall be complied with promptly. In this case, as well as stated by DW17, DW18, DW19 and DW20 the Government is the one which compensated them. However, their claim is on inadequate payment as they have confessed in their witness statements."

Thereafter, the trial court reproduced part of evidence of DW17, DW18, DW19 and DW20 and held that the appellants were compensated but they were not happy with the amount they were paid. It also held that there were other persons who were not compensated. It thus wondered as to why they remained silent and did not lodge any claim against the Government. At the end, it concluded that since the respondent paid to the Government TZS. 8.3 billion for obtaining the suit premises then the Government as per the law was required to deal with the issue of compensation. Consequently, it advised the appellants to forward their claims, if any, to the Government, that is, the Ministry of Lands, Housing and Human Settlements Development (the Ministry).

Thereafter, the trial court reverted to the issues as to what reliefs are parties entitled. It listed all the reliefs claimed by the respondent and awarded the following: -

"1. The declaration order that the plaintiff is the lawful owner of the disputed premises namely, Plots Nos. 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2009 on Block 3 and Plot No. 2006 Block 1 within the City of Dar Es Salaam;

2. An order for the Defendants to give vacant possession to the plaintiff over the disputed premises with immediate effect;

3. An order that the defendants demolish all the structures built on the disputed premises and restore the land to the original position with immediate effect; failure to that, the defendants be evicted from the disputed premises with immediate effect; and

4. In the circumstances of this matter, I have decided not to award any damages neither cost."

From the above, it is obvious that one of the issues framed during trial, that is, whether the respondent had legally acquired the suit premises, was left undetermined. The omission by the trial court was amongst the nine grounds of appeal advanced by the 1st – 17th

appellants in Civil Appeal No. 150 of 2019 in their joint memorandum of appeal. Similarly, the 18th – 42nd appellants raised the same complaint in their eight-point memorandum of appeal in Civil Appeal No. 158 of 2019.

When the appeal was called on for hearing on 20th August, 2021, Mr. Twaha Taslima, learned counsel assisted by Messrs. Tarzan Keneth Mwaiteleke and Hussein Hitu, both learned counsel appeared for the 1st – 17th appellants while Mr. Reginald Martin, also learned counsel appeared for the 18th – 42nd appellants. The respondent had the services of Mr. Mashaka Ngole, learned counsel.

From the outset, before the parties were allowed to submit on the grounds of appeal and there being no objection to consolidate the appeals that arose from the same proceedings and judgment of the High Court, the Court invoked Rule 110 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and consolidated Civil Appeals Nos. 150 of 2019 and 158 of 2019 to be one appeal.

Arguing the appeal, starting with a complaint that the trial court omitted to consider and determine the second issue framed during the final pre-trial and scheduling conference, it was Mr. Mwaiteleke who first took the floor to address the Court on behalf of the 1st -17th

appellants. He first adopted the written submissions filed earlier on in compliance with Rule 106 (1) of the Rules. Expounding the written submission, he argued that, during the trial, the trial court framed three issues to be determined by it. However, he said, the trial Judge determined the first and third issue as it can be garnered from the judgment of the High Court found at page 662 in Civil Appeal No. 150 of 2019.

He further submitted that there was no reason given as to why the second issue which was whether the respondent had legally acquired the disputed property was left undetermined. He contended that failure by the trial Judge to determine the controversy at issue was contrary to the dictates of Order XX Rule 5 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC). He added that paragraph 7 of the plaint at page 13 in the same record of appeal and paragraph 4 of the amended written statement of defence, parties were at issue on whether the disputed property was acquired or not. Besides, he submitted that there was no evidence adduced before the trial court that the land was acquired and no witness from the Ministry was called to testify to that effect and even the Government Notices for acquisition and redevelopment plan were not tendered in evidence.

On the part of the 18th -42nd appellants, Mr. Martin also adopted the written submissions filed pursuant to Rule 106 (1) of the Rules. He concurred with the oral submission of his learned friend that the High Court did not conclusively determine the dispute between the parties because the key issue was left unattended by the trial court.

Responding on that complaint, Mr. Ngole who also adopted the written submissions filed in terms of Rule 106 (7) of the Rules argued that the first and second issues were inter-related and were in effect, conclusively determined by the trial court. He submitted that the trial court discussed in detail as to how the respondent acquired the suit premises, the law applicable and the issue of compensation. In that regard, he submitted that, since the trial court discussed the first issue, it automatically discussed the second issue. He, therefore, urged the Court to dismiss the complaint.

Both Mr. Mwaiteleke and Hitu had nothing to re-join apart from reiterating their earlier submissions that the second issue was left undetermined by the trial court.

From the summary of the record of appeal which we have earlier on reproduced and as rightly submitted by the counsel for the parties, the trial court framed three issues that were deemed to be necessary to

determine the controversy between the parties but only the first and third issues were determined. The second issue was not determined.

Under the provisions of Order XIV rule 1 (5) and 3 of the CPC, the trial court has an obligation to read the pleadings, ascertain the material propositions of facts and law that parties are at variance and thereafter frame and record issues on which the decision of the case would depend upon. The purpose of framing issues is to narrow down the matter in controversy so that parties may lead evidence confined to issues on which the right decision of the case would depend. Further, under the provisions of Order XIV rule 5 (1) and (2) of the CPC, the trial court may, at any time, amend or strike out any issue. Rule 5 of Order XIV provides: -

> *"5. (1) The Court may at any time before passing the decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.*
> *(2) The court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced."*

The above rule empowers the trial court to amend or frame additional issues as may be necessary for proper determination of matters in controversy between the parties. But where the trial court amends an issue or raises an additional issue, it should afford parties with an opportunity to address the court on the new issues framed (see **Oysterbay Villas Limited v. Kinondoni Municipal Council & Another**, Civil Appeal No. 110 of 2019 (unreported)).

In the appeal before us, Mr. Ngole conceded that the trial court did not determine the second issue. Nonetheless, he contended that since the trial Judge determined the first issue, then the second issue was automatically determined. With respect, we fail to go along with his argument for the reasons that: **first**, the trial Judge did not state in her judgment that the first issue was merged with the second issue. **Secondly**, the record does not reflect that there was an amendment of issues. **Thirdly**, by their very nature, the first and second issues are separate and distinct from each other such that they cannot be merged together. The first issue calls for determination as to who is the lawful owner of the suit premises whereas the second issue requires the trial court to determine as to whether the procedure of acquisition of the suit premises from the appellants was adhered to. We believe that the

second issue was framed after the trial court had read the pleadings and noted that the respondent alleged in paragraphs 3, 4, 5, 6, 7 and 8 of the plaint that it lawfully owned the suit premises that were granted to it by the Government after the Government had acquired it from the appellants.

It further noted that such allegation by the respondent was denied by the appellants in their amended joint written statement of defence and put the respondent to strictest proof. It is from those pleaded facts, the trial court rightly deduced that the respondent and the appellants were at variance as to *whether the plaintiff have lawfully acquired the disputed properties from the defendants.* It thus framed it as an issue required to be resolved and determined by it. It is a well settled principle of law that a Judge is duty bound to decide on each and every issue framed. Failure to resolve the controversy between the parties constituted a serious breach that vitiated the impugned decision - see **Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 (unreported).

It is therefore our finding that the first ground of appeal has merit because there was a failure by the trial court to determine the second issue. The omission vitiated the impugned decision and it would have

led to the quashing of the decision and remitting the case to the High Court to determine the unattended issue as we cannot step into the shoes of the High Court - see the cases of **Truck Freight (T) Ltd v. CRDB Ltd**, Civil Application No. 157 of 2007 and **Mantrac Tanzania Limited v. Joaquim Bonaventure**, Civil Appeal No. 145 of 2018 (both unreported).

Nevertheless, there is another irregularity raised by the appellants in the second ground of appeal, that is, whether the suit before the High Court was unmaintainable in law for failure to implead the Government, who, the counsel for appellants argued, was a necessary party to the suit. As alluded to above, the trial court, *suo mottu*, invited parties to address it on the aspect as to whether they were compensated by the Government. The counsel for the appellants submitted before the trial court and to this Court that the Government ought to have been joined so that it could explain if the procedure for acquisition of the suit premises was followed and whether the appellants were paid a fair compensation as required by the law.

The submission of Mr. Mwaiteleke before us was to the effect that according to the pleadings and evidence in the High Court, it became apparent that the Government was a necessary party as such the High

Court ought to have ordered for the Government to be joined as a party in the suit. Elaborating his argument, he referred us to paragraphs 7 and 8 of the plaint, at page 13 in the record of Civil Appeal No. 150 of 2019 and exhibit P1 found at page 574 of the same record, where the respondent alleged that the Ministry requested the respondent to pay promptly the money to the Government so that the appellants could be compensated. He also referred us to page 675 in the same record where the respondent claimed that the suit premises was granted to it by the Government after acquisition. He added that the High Court erred in advising the appellants to sue the Government as after it had observed that the suit premises was acquired by it, the court ought to have invoked Order I rule 10 of the CPC. That is, it ought to have made an order joining the Government or dismiss the suit for non-joinder of the necessary parties. To fortify his submission, he referred us to the case of **Farida Mbaraka & Another v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported).

Mr. Martin added that the Government was a necessary party as the respondent claimed that it paid money to it in order to compensate the appellants but opted not to sue the Government. Instead, he said, the respondent decided to sue the appellants and demanded vacant

possession without there being any proof or evidence that the appellants were compensated. He argued further that the High Court also erred in law because after it had noted that the duty to pay compensation rested with the Government, it ought to have joined her to be a party in the suit.

Responding on the second ground of appeal, Mr. Ngole argued that there was no need of joining the Government because the issue before the High Court was to determine who was the lawful owner of the suit premises. Thus, the issues which were before the High Court did not require the presence of the Government. Besides, he argued, the law on joinder and non-joinder or mis-joinder of parties is clear that in terms of Order I Rules 9 of the CPC the suit cannot be defeated. In rule 13 of Order I of the CPC, required the objection on the ground of non-joinder of the parties be raised at the earliest opportunity and if not raised it is deemed to have been waived. In support of his stance, he referred us to the decision in the case of **Tanganyika Land Agency Limited and Others v. Manohar Lal Aggarwal,** Civil Appeal No. 26 of 2003 (unreported).

He added that the procedure on acquisition of the land by the Government was fully complied with. Therefore, pursuant to section 7 (2) of the LAA, the respondent was entitled to enter into and take possession of

the disputed premises. In addition, he argued that the appellants did not challenge in any court of law, the acquisition procedure. In that regard, he said, in terms of section 11 (1) of the LAA, the only remedy available to them is to seek compensation from the Government.

Having heard the competing arguments, without much ado, the issue for our determination is whether the Government was a necessary party in the suit that was before the High Court.

We wish to start our deliberation by asserting a clear position, on the general rule, that the plaintiff is the *dominus litis,* that is, the plaintiff is entitled to choose the person or persons as appellants against whom he wished to sue. Nonetheless, under Order I rule 10 (2) of the CPC, the court has discretion to add a person who is not a party to the suit as originally constituted as a defendant against the will of the plaintiff, either of its own motion or at the instance of the defendant or a non-party to the suit. Such a discretion will only be exercised where it is necessary to do so in order to effectually and completely adjudicate and settle all the questions in the suit - see **Tang Gas Distributors Limited v. Mohamed Salim Said & 2 Others**, Civil Revision No. 68 of 2011 (unreported).

It should also be noted that in the case of **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman & Another**, Civil Revision No. 6 of

2017 (unreported), the Court lucidly dealt with and discussed the import of Order I rule 9 of the CPC. In its discussion, it observed that the provision is similar to Order I rule 9 of the Indian Code of Civil Procedure, Act No. V of 1908 as amended by Act No. 104 of 1976 save that the Indian Code had a proviso which excludes the applicability of such rule to cases of non-joinder of necessary parties. In that respect, by parity of reasoning and prudence, the Court limited the applicability of the rule to misjoinder and non-joinder of non-necessary parties. It said: -

> *"Our CPC does not have such a corresponding proviso but, upon reason and prudence, there is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that rule 9 of Order I only holds good with respect to the misjoinder and non-joinder of necessary parties."*

Let us now apply the above principles in the appeal before us. The pleadings show that the respondent alleged that the Government legally acquired the suit premises from the appellants but opted not to implead her. Further, it is on record that the trial court remarked that some of the appellants claimed they were inadequately paid while others claimed they were not paid at all. Mr. Ngole argued that the issue before the trial court

was only about the respondent's ownership. On the contrary, the pleadings and evidence show that the respondent claimed ownership by virtue of it been granted by the Government.

In our view, we think that the issues as who was paid, what was paid and whether a notice of acquisition was issued in accordance with the law boil down to the second issue framed by the trial court but l5eft undetermined. We believe that these issues which form part of the second issue could have been effectually and completely adjudicated and determined if the Government was impleaded as a necessary party in the suit. Her presence would have enabled the trial court to settle all the questions involved in the suit, including the issue of compensation to the appellants. We are settled that the absence of the Government as a party in the suit, led the trial court to issue an ineffective order that the appellants should sue the Government for compensation. It is without doubt that if the appellants decide to take the trial court's advice and file a suit against the Government to claim compensation, the respondent would have to be made a party in that suit. This is because of the evidence in record to the effect that the respondent had paid money to the Government in order to compensate the appellants.

We fully agree with the submission of Mr. Mwaiteleke that the facts in this appeal are similar with those in the case of **Farida Mbaraka & Another v. Domina Kagaruki** (supra). In that appeal, the respondent sued the appellants over a house which she claimed that it was sold to her by the Tanzania Housing Agency, a Government agency. The Court noticed that the agency who purportedly sold the disputed house to the respondent was not made a party. It held that the agency could not have been left out of the dispute because the court would not have been able to adjudicate upon the rival claims of the parties more effectively and completely.

In the same vein, we are settled that since the High Court was aware that it was necessary for it to resolve the issue of adequate compensation, it ought to have exercised its power under Order 1 rule 10 (2) of the CPC by ordering the joining of the Government so that it is impleaded as a necessary party to the suit.

In the circumstance, having found the first and second grounds of appeal to have merit, there is no need to address the rest of the grounds of appeal which are concerned with the merits of the appeals.

At the end, we allow the appeal. We thus nullify the proceedings of the High Court in Land Case No. 140 of 2014, quash its judgment and remit the case to the High Court with direction to proceed with the hearing of the

case after joinder of the Government as a party to the suit in terms of Order I rule 10 (2) of the CPC. Given that the suit is yet to be conclusively determined, we make no order as to costs.

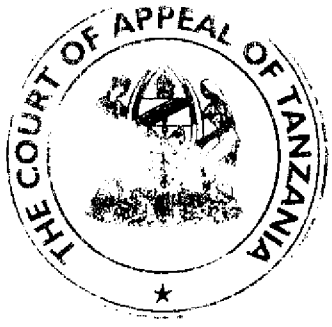
DATED at **Dar es Salaam** this 11th day of November, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The ruling delivered on this 15th day of November, 2021, in the presence of Mr. Abubakar Salum, learned counsel for the appellants who is also holding brief for Mr. Mashaka Ngole, learned counsel for the respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL